No. 3771

United States Circuit Court of Appeals

For the Ninth Circuit

MARTHA M. JACKSON, Executrix of the Last Will and Testament of ELMER B. JACKSON, Deceased,

Plaintiff in Error,

vs.

SUNLIT FRUIT COMPANY, a Corporation,

Defendant in Error.

Reply Brief on Behalf of Plaintiff In Error

By A. H. HEWITT and M. M. GETZ

Filed this ..... day of March, A. D., 1922.

FRANK D. MONCKTON, Clerk.

By ....., Deputy Clerk.

Sutter Farmer Yuba City

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We have just a few thoughts that we wish to submit to the Court in reply to the brief of defendant in error in this case.

Illness has prevented us from making an ex-

tended review of the authorities cited in the brief of defendant, and for that reason we will have to leave the points made by counsel to the judgment of the Court after a brief statement in relation to the same.

FIRST:

It was never contended by us that stockholders of a corporation are disqualified to testify under subdivision three of Section 1880 of the Code of Civil Procedure. Our contention is that officers of a corporation that is a party to the action are so disqualified. A corporation can act only by and through its officers and to permit such officers or agents to testify under that section and to exclude the other party to the action from testifying is an unjust and unfair interpretation of the law. The Administratrix was disqualified to testify as to any matters of fact which occurred prior to the death of decedent and to permit the officers of the plaintiff to testify was not a uniform operation of the law guaranteed by the Constitution.

We submit that the principle invoked in the case of *Rose* v. *Southern Trust Co.*, 178 Cal., and in *Palmer* v. *Guaranty Trust and Savings Bank*, 188 Pac. 312, cited in our opening brief are conclusive on this point.

The cases cited by counsel for defendant in error on this point go to the qualification of stockholders to testify under that section. Stockholders are not officers or agents of a corporation, and their interest is too remote to bring

them within the rule under the section quoted.

SECOND:

We contend that the contracts upon which the action is based were invalid and were inadmissible as evidence in the action. The reasons for this contention are fully set forth in our opening brief herein. We pointed out the ground upon which the contracts were invalid. The contract was not to be performed within a year and it was an agreement for the sale of goods at a price of more than two hundred dollars. There was no written authorization under which Laney was empowered to make the contracts on behalf of the corporation, and under the authority of *Pacific Bank* v. *Stone* 121 Cal. 202, and the other cases cited in our opening brief this evidence should have been excluded by the trial court.

We think that upon an examination of the authorities cited by counsel for defendant in error on this point the Court will find that where such contracts have been held valid the contracts were made as individuals or signed by an officer of the corporation, duly authorized to make such contracts under general provisions of the by-laws of the corporation. This contract comes squarely within the cases of

Pacific Bank v. *Stone,* 121 Cal. 202;
Blood v. *La Serena Land Co.,* 113 Cal. 221....

THIRD:

Defendant in error makes the point that be-

cause we did not make an assignment of error concerning the signature of the wife of Jackson to the contracts we can not now be heard on this point. We think, in view of rule eleven of this Court that the Court "may notice a plain error not assigned," that the point made by counsel is not good. The record shows that the land at Bogue mentioned in one of the contracts was the separate property of Mrs. Jackson and the property at Oswald was the community property of the spouses. The deed to these respective properties were admitted in evidence and form part of the record in this case. The first deed is "Exhibit F" found at page 98 of the transcript, and the second deed is "Exhibit G," found at page 101 of the transcript. These deeds were of record in the office of the Recorder of Sutter County and defendant in error had notice of the same and of the character of the property when the alleged contracts were executed. The Court will note that the contracts in question do not call for the sale of peaches in general but they do call for the sale of peaches produced on the particular land mentioned in the deeds, and the defendant in error had full notice that the wife of Jackson was the sole owner of one tract and that she had a community interest in the other tract. In order to make a binding contract for the sale of fruit from these particular lands it was necessary, and defendant in error had due notice of such necessity, that Mrs. Jackson join in the execution of the contracts.

This was particularly true as to the fruit pro-

duced on her own land and it was necessary under the provisions of Section 172 of the Civil Code. As above stated the sale was not a general sale for the delivery of fruit but it was a contract for the delivery of fruit from these particular lands

A contract is never valid unless it can be legally enforced. Suppose the corporation had elected, instead of bringing an action for damages, to have brought an action for specific performance of the contract and to compel the delivery of the fruit produced on the lands. It is clear that such a contract could not have been enforced because of the fact that the owner of the lands did not join in making the contract. Is it not equally clear that the defendant in error was not entitled to judgment for damages because of the non-delivery of the fruit from these particular lands? Of course, if Jackson at the time of making the contracts had a lease of these lands for the ten-year period, he would have been in a position to have agreed to deliver the fruit but no evidence was offered showing that he had any right to deliver the same and if such right existed the burden of proving such right was upon the defendant in error.

While it is true, as contended by counsel for defendant in error, that contracts for future sales of fruit owned by the party is not void even if the fruit is not in existence, yet this is not the case here. These alleged contracts were for the sale and delivery of fruit to be produced on *particular specified lands*, some of which was not owned by

the party making the contract, and some of which was owned by such party and his wife as community property. So far as the delivery of the fruit from the separate property of Mrs. Jackson there was no showing made by the corporation that Jackson was in a position to make such delivery, and so far as the delivery of the fruit from the property owned by the community, Jackson was in no position to make delivery under Section 172 of the Civil Code without the consent of his wife, and the defendant in error had due notice of these conditions when the alleged contract was executed, and in no event could Jackson make such delivery after his death. If he could, by the execution of these contracts, have tied up the community property for ten years after his death, he could have done so for fifty or one hundred years thus, according to the contention of counsel for defendant in error, have prevented the other owner of the community interest from any use of the proprty for peach production.

FOURTH:

The Court will note that the alleged contracts were executed only about two months prior to the declaration of war made with our Government with the German Empire. It is a matter of common knowledge that the increased cost of production of all farm products were over one hundred per cent within a few months after war was declared. We endeavored to show that all canneries having term contracts, including the defendant in error, by reason of this increased cost, voluntarily

advanced the price of peaches to meet war conditions, to as high as $85.00 per ton. This we were not permitted to do under the ruling of the trial judge. If the defendant in error did advance the price of peaches as contended in the answer of the plaintiff in error to $85.00 per ton because of this war conditions, it is difficult to see wherein it was damaged by not making or offering to make the same advancement to Jackson. For these reasons we submit that the judgment rendered by the trial court in view of the offer made was unreasonable and unjust.

In this action we claim that the court erred in finding damages for the entire nine-year period. The evidence offered in support of such damages was speculative to the greatest degree. Under the very nature of the case the damages were not ascertainable to any degree of certainty. No one could say that frost or other conditions would not destroy the entire crop of peaches during half of the term of the contract. Yet plaintiff in error was assessed damages to the extent of $60.00 per ton for peaches whether they were produced or not. This case comes squarely within the provisions of Section 3301 of the Civil Code providing that no damages recovered for the breach of contract which are not clearly ascertainable in both their nature and origin. The Supreme Court of this State has stated that the measure of damages in cases of this nature are governed by Sections 3300 and 3301 of the Civil Code of this State.

Cornell v. *Western Union*, 199 Pac. 1087.

The cases cited by the defendant in error at pages 29 and 30 of its brief are not in point here The damages in those cases were readily ascertainable. They were not speculative. The contracts were for a short time only, or the very nature of them made the amount of damages ascertainable. The Federal decisions are not authority in actions of this kind as this Court has repeatedly held that in actions of this nature the laws of the State in which the contract was made and was to be performed are to be considered and followed in fixing damages.

The State of California has provided the measure of damages by the enactment of Sections 3300 and 3301 of the Civil Code, and the last section precludes a judgment in favor of the defendant in error because the damages were not ascertainable and were speculative.

Lane v. *Storke*, 13 A., 600;
Westwater v. *Rector, etc.*, 10 A., 347;
Westwater v. *Grace Church*, 140 Cal. 339;
Western Union v. *Hall* (Iowa) 124 U. S. 444.

For the reasons stated above the judgment should be reversed.

M. M. GETZ and
A. H. HEWITT,
Attorneys for Plaintiff in Error

Copy of the within brief of Plaintiff in Error received this ..... day of March, A. D. 1922

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Attorneys for Defendant in Error